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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., *Appellants*

—against—

EWALD B. NYQUIST, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE

JOSEPH B. FRIEDMAN
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for the Baptist Joint Committee on Public Affairs As Amicus Curiae

LUCAS, SELDEN, FRIEDMAN & MANN
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

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CITATIONS

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INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: the American Baptist Churches in the U.S.A., the Baptist General

Conference, the National Baptist Convention of America, the National Baptist Convention, U.S.A., Inc., the North American Baptist General Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. These Baptist groups have some 23 million members who evidence a direct interest in church-state relations. The Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. It is the opinion of the Baptist Joint Committee on Public Affairs that the principle of religious liberty is jeopardized by the decision of the United States District Court for the Southern District of New York, dated October 2, 1972, which is on appeal in this case.

STATUTE INVOLVED

The statute involved in the case at bar is Chapter 414 of the New York Laws of 1972.

QUESTIONS PRESENTED

This *amicus* responds only to the technical question: Did the United States District Court for the Southern District of New York err in holding that Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 do not violate the Establishment Clause of the First Amendment of the United States Constitution? Less technically

the question may be stated: Does the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *prohibit* the state of New York from granting " . . . tax credit for tuition paid by parents to nonpublic schools. . . ." (majority opinion *Committee for Public Education and Religious Liberty, et al.*, v. *Nyquist, et al.*, 72 Civ. 2286 DCSDNY, October 2, 1972 here on appeal) on the elementary and secondary level which are church-controlled and church-operated?

STATEMENT OF THE CASE

Chapter 414 of New York Laws, 1972 is the fourth of a series of laws passed by the state legislature over the past two years which have been challenged in the courts as violative of the Establishment Clause of the First Amendment to the Constitution of the United States.

Section 1 of Chapter 414 provided public funds to maintain and repair nonpublic elementary and secondary schools. Section 2 of Chapter 414 authorized a tuition reimbursement to parents of children enrolled in nonpublic elementary and secondary schools if those parents had a New York taxable income of under five thousand dollars per year. These two Sections were unanimously declared violative of the Establishment Clause in the case here on appeal.

Sections 6-10 deal with aspects of aid to public education and are not in controversy in the pending case. Section 11 is the severability clause which is in controversy in this case. However, this raises a technical legal question to which this *amicus* does not choose to respond.

The United States District Court for the Southern District of New York, in the case here on appeal, on October 2, 1972 held in a 2-1 decision that Sections 3, 4 and 5 of Chapter 414 are not violative of the Establishment Clause.

Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for state income tax purposes, from his federal adjusted gross income an amount shown in a table [1] for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent. This process is titled in the New York tax law as amended, "Modification for nonpublic school tuition" [§ 612(j)]. It is this progressive tax credit and the rationale which underlies it which has been challenged under the Establishment Clause in the case now at bar.

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If Adjusted Gross Income is	*Income Exclusion Per Pupil is*	*Estimated Net Benefit to Family*		
		One child	*Two children*	*Three or more*
Less than $9,000	$1,000	$50.00	$100.00	$150.00
$9,000 — 10,999	850	42.50	85.00	127.50
11,000 — 12,999	700	42.00	84.00	126.00
13,000 — 14,999	550	38.50	77.00	115.50
15,000 — 16,999	400	32.00	64.00	96.00
17,000 — 18,999	250	22.50	45.00	67.50
19,000 — 20,999	150	15.00	30.00	45.00
21,000 — 22,999	125	13.75	27.50	41.25
23,000 — 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

SUMMARY OF ARGUMENT

The argument below may briefly be summarized as follows:

1. Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 reflect a legislative purpose directed at providing public aid to religious parochial schools and, therefore, are inconsistent with the "primary purpose" test established by this Court.

2. The Establishment Clause requires governmental neutrality toward religion. Rather than achieving neutrality, the primary effect of Sections 3, 4 and 5 of Chapter 414 is to grant public aid to sectarian religion and its institutions.

3. Sections 3, 4 and 5 of Chapter 414 do not set up sufficient administrative controls to guarantee that the aid provided is used for secular purposes. Further, the sections excessively entangle government and religion politically.

4. The tax credit provided for in Sections 3, 4 and 5 of Chapter 414 and the religious character of the class of schools to which they are applicable constitute an unconstitutional public support by the government of the teaching *of* religion.

5. Sections 3, 4 and 5 of Chapter 414 offend the Establishment Clause by creating a form of compulsory religion.

ARGUMENT

Religious groups operate and control elementary and secondary schools—usually on a financially sacrificial basis—for religious reasons. As a result of *Engel* v. *Vitale,* 370 U.S. 421 (1962), and *School District of Abing-*

ton Township v. *Schempp*, 374 U.S. 203 (1963), a number of Protestant schools have been established so that parents might provide an education for their children which embodies prayer and Bible reading as an integral part of the school day. Long before these two decisions other church-operated and church-controlled elementary and secondary schools existed—and they continue to exist—in order to perpetuate a religious belief and to provide an educational milieu of which religion is an integral part.

In an article, "Why Catholic Schools?," Father Christopher O'Toole, C.S.C., stated:

> The purpose of the parochial school is to permeate with the Faith and the spirit of the Gospels the total educative process. In a parochial school the teaching of religion, for example, is not simply just another subject to be learned and which is not taught in the public schools. No, the entire curriculum is to move forward in an atmosphere of faith in order to produce a pupil who knows, at least in an elementary way, how to relate all knowledge to its ultimate source—God himself. *National Catholic Register*, August 6, 1972.

> The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be the principal and dominant reason for the existence of such schools. *Essex* v. *Wolman*, 409 U.S. 808 (1972).

The District Court for the Southern District of New York in its opinion on the case now at bar stated:

> In the case at bar, we are dealing largely with the same parochial school system that was before this

Court in *Committee for Public Education and Religious Liberty* v. *Levitt and Nyquist*, 342 F. Supp. 439 (S. D. N. Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissons; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.

Because 93.5% of the students in nonpublic elementary and secondary schools in New York are enrolled in church-operated and church-controlled schools—more than 90% of which are Roman Catholic schools—it is submitted that the class created by Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 is overwhelmingly religious in composition. Due to the limited nature of the class created and to the predominance of one religious group within that class, the principal beneficiary of this statute must be organized religious activity.

1. Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 do not reflect a primary secular legislative purpose and, therefore, do not meet one of the tests of constitutionality set by this Court in *School District of Abington Township* v. *Schempp*, *supra*, at 222-223.

The difficulty of demonstrating that a legislative body has other than a secular legislative purpose when it passes acts dealing with education in church-operated and church-controlled elementary and secondary schools when a detailed, accurate record of all aspects of the legislative process is not kept is granted. It is further granted that, *generally*, legislative bodies, as coequal branches of government, have made their own determination on the issue of constitutionality of their acts and that the courts should *usually* assume *prima facie* constitutionality. However, Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 must be considered as an exception to the rule.

The New York legislature in Section 3 of Chapter 414 assumed the secular desirability of pluralism in education and maintained that nonpublic elementary and secondary schools perform a secular function by relieving the taxpayers of the state of the burden of providing public school education for those children enrolled therein [§ 3(3)]. Despite these stated secular purposes the facts in this particular case are such that one cannot logically accept a primarily secular purpose in the legislature's action.

Though the class of nonpublic elementary and secondary schools is defined to include most of the nonprofit schools in the state, the overwhelming preponderance of schools included in the class has been shown to be church-operated and church-controlled. Only these religious schools were active in encouraging the legislature to enact the contested legislation. They were most vocal in stating the essentiality of public financial aid to their continued viable existence. It is highly unlikely that the legislature would have considered a bill to grant financial aid to nonpublic schools if the class of schools so aided

had not included the 93.5% of those schools which are religious in their operation and control. It is doing the New York legislature no injustice to infer logically from the legislative records available that the main legislative purpose of Sections 3, 4 and 5 of Chapter 414 was to aid church-operated and church-controlled elementary and secondary schools.

Even if a nonsecular legislative purpose is not in the exact wording of Sections 3, 4 and 5 of Chapter 414, the religious press of New York was not in doubt about legislative intent. A reading of that press during the legislative action on Chapter 414 leaves no doubt that the legislation was fostered by and intended to aid religiously operated and controlled elementary and secondary schools.

It is a *non sequitur* to maintain that a secular legislative purpose is assured because public financial aid to nonpublic schools relieves taxpayers of the financial burden of providing public education to students now in nonpublic schools.

> The short answer to the argument that sectarian schools benefit the general populace by reducing the expenditures needed to support the public schools is that our Constitution embodies values which override considerations of mere cost efficiencies or school savings. *Kosydar* v. *Wolman*, —— F.2d —— (S.D. Ohio, December 29, 1972).

We agree with the court in *Kosydar* v. *Wolman*, *id.*, that ". . . the Establishment Clause stands as a bar to aid of Church schools, even though social pluralism may be enhanced and tax dollars saved by virtue of these schools' existence." The New York legislature may have been correct when it assumed that Sections 3, 4 and 5 would help to achieve educational pluralism and, by giving some

public aid to nonpublic schools, would save taxpayers some money. However, because the class of schools it established to receive public aid is so decisively religious in character, because the total educational program of religious schools is permeated with the teaching *of* religion, and because the type of aid provided is tied to tuition actually paid to these schools, it cannot be assumed and we cannot accept that the primary purpose of New York's legislature was secular in this act.

> If individuals, for reasons of personal religious belief, voluntarily undergo a financial handicap, foregoing available public facilities by sending their children to selected schools, the First Amendment stands as a bar to their being reimbursed by the state for their sacrifice. This principle is no less vital if, as a result of such sacrifices, the state achieves cultural diversity or derives economic benefit. *Essex* v. *Wolman, supra.*

2. Sections 3, 4 and 5 of Chapter 414 do not satisfy the "primary effect" test also enunciated in *Abington* v. *Schempp, supra.*

In his dissent on these three sections in the case now at bar, Circuit Judge Hays compared them to Sections 1 and 2 of Chapter 414 which the three judge court unanimously declared to be contrary to the Establishment Clause. "The purpose and effect . . . are the same . . ., i.e., to subsidize religious training for children." *Committee for Public Education and Religious Liberty, et al.,* v. *Nyquist, et al., supra*

Supporters of appellees' position argue that Sections 3, 4 and 5 merely give a tax advantage to the parents of children in nonpublic schools and that the parents may spend the money they save in taxes for whatever they

want. This, they assert, satisfies the "primary effect" test. This position is entirely without merit.

The class of schools to which a taxpayer must pay tuition in order to claim a tax credit is overwhelmingly sectarian, the instruction in the sectarian schools is impregnated with sectarian religion, and the tax credit is based on tuition already paid. Parents of children in predominantly sectarian schools are rewarded by preferential tax treatment for the sole reason that they have paid tuition to a suspect class of nonpublic institutions. This can only have the primary effect of aiding religion. To claim that indirect aid is not aid is specious reasoning and is contrary to the holdings of this Court.

In *Essex* v. *Wolman, supra,* in dealing with an analogous attempt to aid religious schools, the three judge District Court for the Southern District of Ohio unanimously held —and was affirmed by this Court (409 U.S. 808, 1972)— that:

> The state cannot claim it does not know what the parents will do with their grants, for the expressed intent of the statute is to "reimburse parents of nonpublic school children for a portion of the financial burden experienced by them" in sending their children to parochial schools. *It does not matter that the parents are subsequently free to use the money received for any purpose. The intent of the statute in providing the reimbursement must speak for itself.* [emphasis added].

We submit that the effect of Section 3(5) of Chapter 414 which states:

> 5. The legislature hereby finds and determines that similar modifications . . . should also be provided to

> parents for tuition paid to nonpublic elementary and secondary schools . . .

is identical to the effect of the reimbursement device proscribed in *Essex* v. *Wolman, supra.*

> "[I]t is the use to which public funds are put" and not to whom they are provided that is controlling. . . . *What may not be done directly may not be done indirectly lest the Establishment Clause becomes a mockery. Abington* v. *Schempp, supra,* at 230 (Douglas, J., *concurring*).

It is correct that this Court did permit aid to parents and students in *Everson* v. *Board of Education,* 330 U.S. 1 (1947) and *Board of Education* v. *Allen,* 392 U.S. 236 (1968), but in these cases the class of students was broad and the aid provided—transportation and state-approved textbooks—was ideologically neutral. In the case at bar the opposite prevails. The class is predominantly sectarian and the aid—tuition assistance—is not ideologically neutral. The effect, therefore, is an affront to the Establishment Clause and cannot stand.

> The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination. *Everson, supra,* at 24 (Jackson, J., *dissenting*).

3. Sections 3, 4 and 5 of Chapter 414 engender excessive entanglement of government and religion.

This Court enunciated the doctrine of excessive entanglement of government and religion in *Walz* v. *Tax Commission,* 397 U.S. at 674 (1970), to set some standards for constitutionally permissible church-state interactions under the Establishment Clause. The doctrine was elab-

orated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), as was the distinction between administrative and political entanglement. Excessive administrative *or* political entanglement were established as bases for a determination of unconstitutionality. By affirming *Essex* v. *Wolman*, *supra*, this Court further delineated the doctrine.

In discussing Sections 3, 4 and 5 the majority in the case at bar stated:

> In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support.

If it was the concern of the legislature in passing Sections 3, 4 and 5 that religious parochial schools not go under for lack of financial support, it follows that the legislature thought that the passing of this piece of legislation would provide, albeit indirectly, financial support to "religious parochial schools" to keep them from going under. Therefore, these Sections, by definition, provide public financial aid to religious parochial schools. It must be determined whether aid of this type results in excessive administrative entanglement.

Essex v. *Wolman*, *supra*, stated that the criteria for determining administrative entanglement as a result of aid given to religious schools are: (1) the use to which the aid is put, (2) the form in which the aid is provided, (3) the person or institutions to which the aid is directed, and (4) the extent to which the state must intervene to determine that the aid is spent for constitutionally secular purposes.

We have demonstrated that public aid was provided to religious schools (which overwhelmingly make up the class created by the legislature) and was tied to tuition actually paid to them.

> Tuition forms the major part of a school's general fund and moneys derived from it can be used for any purpose it deems legitimate. Such funds may be used for the construction of a chapel as well as a gymnasium; for the purchase of religious icons as well as laboratory test tubes. *Id.*

The aid was given in the form of balloon "deductions" which, when simple mathematics are applied, are revealed as a system of thinly disguised tax credit for tuition already paid to schools in this suspect class—declared unconstitutional by a three judge court in *Kosydar* v. *Wolman, supra.* The New York legislature provided that aid "to see that religious parochial schools do not go under for lack of financial support" be given to those schools indirectly through parents who paid tuition to those schools. However, this Court has held that this type of conduit for aid does not have a cleansing effect *Essex* v. *Wolman, supra* and is not constitutionally permissible. The first three tests for administrative entanglement clearly are not satisfactorily met by Sections 3, 4 and 5 of Chapter 414.

On their face, Sections 3, 4 and 5 provide for less direct state administrative intervention than previously invalidated attempts to aid religious schools have. However, if financial aid is given either directly or indirectly for any purpose, it is axiomatic that those who supply the aid and those who receive it must be held accountable. Basic cannons of legality and responsibility are involved.

It is this fourth prong of the test for excessive administrative entanglement which presents the legislatures with a dilemma from which they will find it difficult to extricate themselves either legally or logically. In *Lemon* v. *Kurtzman, supra,* and *DiCenso* v. *Robinson,* 403 U.S. 602 (1971), it was held that the administrative rules established were such that the government was excessively entangled with religion. Ohio's legislature then passed a tuition reimbursement act which is analogous to the act challenged in this case. In Ohio a portion of tuition paid to an almost identical class of schools was returned to parents who had children enrolled in those schools. No restrictions were set by the state to guarantee that the reimbursed tuition money would be spent for non-religious purposes. This *lack* of administrative control was held to be a defect by a three judge court in *Essex* v. *Wolman, supra,* which was affirmed by this Court:

> The parent has voluntarily undertaken an obligation to pay tuition to a non-public school and the school in return has agreed to educate that child in an atmosphere oriented, if not dominated, by the teachings of a specific religion. At the end of the transaction, the parent has applied for and received reimbursement from the State . . . solely and specifically because he has paid that sum to the denominational school. . . . *Since the parents in this scheme serve as mere conduits of public funds, the State retains a responsibility of insuring that the public moneys thus provided and which retain their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used.* [emphasis added].

Thus, if aid to religious schools, while avoiding exces-

sive entanglement with state administrative supervision, does not incorporate sufficient administrative controls to insure that the aid is used for strictly secular purposes, it is defective with reference to the Establishment Clause. Sections 3, 4 and 5 of Chapter 414, we submit, are so defective.

> . . . *any* general purpose aid, lacking non-entangling restrictions on use, constitutes an almost *per se* violation of the Establishment Clause. *Id.*, at fn. 20.

Sections 3, 4 and 5 fail to satisfy the established tests for administrative entanglement, and the political entanglement which this piece of legislation generates is an additional fatal defect.

In a separate concurring opinion in *Walz* v. *Tax Commission, supra,* Justice Harlan emphasized that the Court must look closely at legislation challenged as giving rise to excessive entanglement between government and religion to see if that legislation avoids the "risk of politicizing religion" and "political fragmentation on religious lines." 397 U.S. at 695.

In *Lemon* v. *Kurtzman, supra,* the Court, in addressing itself to the divisiveness of political entanglement, said that though ordinarily

> . . . political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government . . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . To have States or communities divide on the issues presented by state aid to parochial schools

would tend to confuse and obscure other issues of great urgency. . . . Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is thus likely to be intensified. 403 U.S. at 622-623.

Sections 3, 4 and 5 of Chapter 414 almost guarantee that such political fragmentation and divisiveness on religious lines will be intensified. The amounts of money allowed to be deducted from gross income for New York tax purposes are subject to annual review. If these sections are allowed to stand, the legal basis of constitutionality will be established and, in response to demands on the political system for increased aid, divisive religious confrontations periodically will ensue. Because this open-ended type of aid invites controversy and because religious belief involves emotions, legislation such as this will increase at a geometrical rate the religious divisiveness already created by the existence of the questioned legislative act.

As we have said, the class of schools aided by Sections 3, 4 and 5 is decisively sectarian. There is a direct relationship between the degree to which a class is sectarian and the degree of entanglement that results. If a class receiving public financial aid is decisively sectarian, then it is essential that the element of entanglement be closely scrutinized. *Kosydar* v. *Wolman, supra.* The statute involved in the case at bar does not stand that scrutiny. Inevitable political entanglement at an unconstitutional level is manifest.

4. A special tax incentive or tax credit to reimburse parents for tuition paid to a class of nonpublic elementary and secondary schools which is overwhelmingly church-operated and

church-controlled is an unconstitutional financial support by the government of the teaching of religion.

The business of religion is religion. The business of religiously controlled and operated elementary and secondary schools has been shown to be the infusion of sectarian religion into every facet of a student's educational program.

Circuit Judge Hays, in his dissent against the three judge court's decision on Sections 3, 4 and 5 said:

> The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essential difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school. *In both instances the money involved represents a charge made upon the state for the purpose of religious education.* [emphasis in last sentence added].

Since the benefits to parents under Sections 3, 4 and 5 are, in fact, charges made upon the state for the purpose of religious education, they are an affront to the Establishment Clause.

This Court ruled in *Abington, supra,* and *Engel, supra,* that public schools supported by public funds may not teach religion through either compulsory prayer or compulsory Bible reading. The melding of public funds into nonpublic schools makes for government support of the teaching of religion in these schools. This Court has held that government must neither aid nor inhibit religion and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt

to teach or practice religion." *Everson* v. *Board of Education, supra,* at 15-16

The granting by a state to a taxpayer of the privilege of deducting the face value of any contribution to a legally recognized class of potential recipients is not in dispute in this case. Instead Sections 3, 4 and 5 create essentially a sectarian class and any tuition paid to a school in that class is in anticipation of services to be received. Therefore, we are not dealing here with contributions but with the granting to taxpayers who send their children to religious schools of a tax "deduction" of a substantial sum of money which, in fact, has not been "contributed" and logically cannot be considered a generous gift without anticipation of personal gain. It is clear that these sections do not provide for *bona fide* deductions but rather for a tax credit to parents of children in religious schools.

Because tax credits have been held unconstitutional in *Kosydar* v. *Wolman, supra,* and direct aid to religious elementary and secondary schools is proscribed in *Lemon* v. *Kutrzman, supra,* under the entanglement doctrine, so then this indirect attempt to achieve identical ends is unconstitutional and proscribed. The New York legislature has attempted, by indirection, to circumvent this Court's proscription against the use of public funds to support the teaching *of* religion. Such legislative action is contrary to the Establishment Clause.

5. Public financial aid to church-operated and church-controlled elementary and secondary schools constitutes compulsory religion.

The principle of religious liberty antedates the American republic and abhors compulsory religion. Roger Williams wrote: "Forced worship is a stinck [sic] in the nostrils of God" (*The Bloudy Tenent of Persecution*); and

Thomas Jefferson wrote in the *Virginia Statute of Religious Liberty*: ". . . no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief" (Sec. II). This is a part of the philosophy bound up in the religion clauses of the First Amendment.

In *Anderson* v. *Laird*, 466 F.2d 283 (1972), (*cert. denied* by this Court), the United States Court of Appeals for the District of Columbia held that compulsory chapel attendance at the three federal military academies was compulsory religion and, therefore, repugnant to the religion clauses of the First Amendment.

The majority which affirmed the constitutionality of Sections 3, 4 and 5 of Chapter 414 in the District Court for the Southern District of New York declared in the case now at bar that these sections provided aid to "religious parochial schools." Those religious parochial schools comprise 93.5% of the schools in the class created by this legislative act. These schools teach sectarian religion throughout their academic curriculum.

The aid to religious parochial schools comes from tax credit for tuition already paid and constitutes funds which are subject to state control. When public funds, which are collected from all taxpayers regardless of religious belief or lack of religious belief, are used to aid, either directly or indirectly, elementary or secondary schools which teach religion, all taxpayers are compelled to assist in the support of that teaching of religion. State-coerced financial support of religion is one of the oldest and purest forms of the establishment of religion and is clearly at odds with the Establishment Clause of the First Amendment.

CONCLUSION

That portion of the decision of the District Court for the Southern District of New York dealing with Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 should be reversed.

Respectfully submitted,

JOSEPH B. FRIEDMAN
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for the Baptist Joint Committee on Public Affairs As Amicus Curiae

LUCAS, SELDEN, FRIEDMAN & MANN
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

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NO. 72-791, NYQUIST VS. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

NO. 72-929, CHERRY VS. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
CONVENED PURSUANT TO TITLE 28,
SECTIONS 2281 AND 2283

MOTION AND BRIEF OF AMICUS CURIAE UNITED AMERICANS FOR PUBLIC SCHOOLS

Supreme Court, U.S.
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HENRY C. CLAUSEN
234 Van Ness Avenue
San Francisco, California 94102
Attorney for Amicus Curiae

Washington, D.C. • THIEL PRESS • (202) 393-0625

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SECTIONS 2281 AND 2283

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

United Americans for Public Schools respectfully moves this Court for leave to file its annexed brief as amicus curiae.

Applicant is a California nonprofit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitutions of the United States and of the State of California, and to disseminate to its members and to the public,

related, objective and educational facts and findings to preserve the purposes of public schools and of the said constitutions and to foster adherence thereto and support thereof.

Applicant has an interest in this case and is vitally concerned in the outcome in that it now has pending in the United States District Court for the Northern District of California a complaint attacking laws that the California Legislature enacted January 17, 1973 and in which the basic question involved is similar to that presented for decision in the instant cases. It is felt there are state constitutional, as well as federal constitutional points involved, and this Court has held that where the Federal Court has jurisdiction it is authorized to determine all the questions in the case, local as well as federal, and the court in this respect has considered state constitutional standards in the interpretation of the Constitution.

While applicant's case is not now before the Court, it might well be in the near future. It is believed that the arguments applicant makes in the annexed brief will be involved.

Amicus Curiae has applied for consent of the parties herein within the time prescribed for filing briefs but responses have not yet been received. Counsel for amicus curiae is a resident of California and will not be able to review all the briefs filed to ascertain the complete specifics of need for additional commentary. But having reviewed some of said briefs, it appears there now is such need and that the points raised in the annexed brief will present additional points not yet covered and will be helpful to the Court. A three-judge court in the District Court of the United States for the Southern District of Ohio, Eastern Division, rendered on December 29, 1972

its opinion holding unconstitutional legislation similar to that involved in the present case. It is felt the Court should have the benefit of analysis of said opinion by amicus. The special considerations will appear more fully herein.

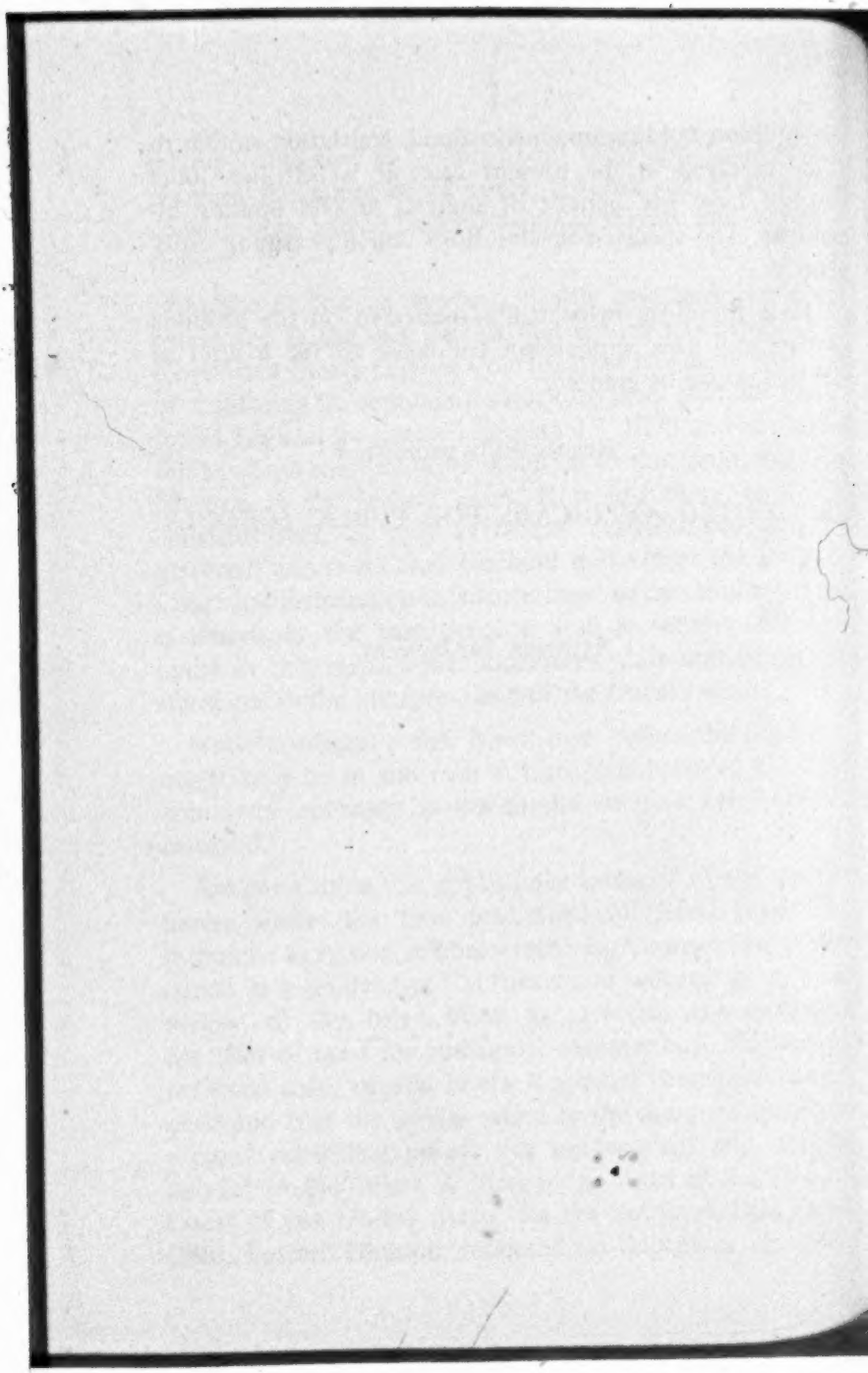
It is therefore respectfully requested on the grounds above that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted

UNITED AMERICANS FOR PUBLIC SCHOOLS

By

Attorney for Movant.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-694, COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY VS. NYQUIST

NO. 72-753,, BRYDGES VS. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

NO. 72-791, NYQUIST VS. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

NO. 72-929, CHERRY VS. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
CONVENED PURSUANT TO TITLE 28,
SECTIONS 2281 AND 2283

BRIEF

INTEREST OF THE AMICUS CURIAE

United Americans for Public Schools, a California nonprofit corporation, and its members, citizens and taxpayers of the United States and of the State of California, are vitally interested, both personally and economically, in the issues of the instant case because (1) of its concern generally with preserving the purposes of public schools and of our traditional Constitutional Doctrine of Separation of Church and State and because (2) Amicus has filed its complaint in the Northern United States District Court of California to enjoin execution of

California Legislation similar to that which appellants attack, and said suit involves issues similar to those in the instant case.

STATUTES INVOLVED

The statutory provisions involved in these cases appear in Appellant's Jurisdictional Statement which amicus by reference incorporates herein.

QUESTION PRESENTED BY THIS BRIEF

To avoid redundancy in briefing, Amicus poses the following additional single question:

(a) Whether this court should adopt the reasoning and analysis set forth in the three-judge opinion of the United States District Court for the Southern District of Ohio, Eastern Division, Civil Actions Numbers 72-212 and 72-222, decided December 29, 1972, subsequent to the decisions below, titled Robert J. Kosydar, Tax Commissioner of Ohio, et al., Plaintiffs, v. Benson A. Wolman, et al., Defendants, Benson A. Wolman, et al., Plaintiffs, v. Robert J. Kosydar, Tax Commissioner of Ohio, et al., Defendants.

Appellants therein have appealed to this Court (titled herein James Grit, et al., Appellants vs. Benson A. Wolman, et al., and numbered herein 72-1139-ATX). A copy of the opinion is annexed as Appendix B to Appellants Jurisdictional Statement. Application for stay of injunction was made and denied January 22, 1973. Motion to expedite and to advance oral argument was made and denied February 26, 1973.

STATEMENT OF THE CASE

Reference is made to the foregoing motion and to Appellant's Statement.

ARGUMENT

A brief preliminary review of some authorities may be helpful. In June 1971 this Court struck down laws of Pennsylvania and Rhode Island that would have diverted public funds to parochial schools and thus would have entangled excessively the state and churches, and would have advanced the indoctrination of religion in violation of the First Amendment to our Constitution. The Pennsylvania plan in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), would have given public funds to church schools under the guise of "purchasing secular services," i.e., paying the parochial schools to educate children in subjects supposedly without religious significance. The Rhode Island device in *Earley v. Di Censo*, 403 U.S. 602 (1971), would have given to teachers of secular subjects in church schools state funds as supplementary salaries. In October 1972 this Court struck down as unconstitutional an Ohio Plan in *Wolman v. Essex*, 342 F. Supp. 399, affirmed ___ U.S. ___, 41 L.W. 3167 (1972), for reimbursing from public funds parents of parochial and private school children for tuition paid. The Supreme Court cited its earlier decisions and upheld a ruling of the Ohio special three-judge federal panel holding the program violated the Constitution as an "establishment of religion." A Pennsylvania three-judge district court in *Lemon v. Sloan*, 340 F. Supp. 1356 (1972) also held such a plan unconstitutional and said this in part:

> "[We] do not perceive any constitutional significance in the fact that payments are made in the